86-557

No.

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL SCOTT,

Petitioner,

vs.

RHODA MANDEL GREENBERG, Executrix of the Estate of JENNIE MANDEL BARNETT, deceased [Bryan B. Johnson, Administrator dbn WWA substituted], ENID MANDEL RESNICK, LINDA RESNICK MARANS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF OHIO, TENTH APPELLATE DISTRICT

RONALD PODOLSKY, ESQ.
Attorney for Petitioner
15 Park Row
New York, New York 10038
(212) 460-8218

45 pgs

QUESTION PRESENTED

1. Does due process prevent a State, which has created a statutory cause of action and which has provided a right of access to its courts, from denying a party a hearing on the merits of his claims, where the party has not appeared on the day of trial due to his documented medical incapacity ?

PARTIES

Plaintiffs-Appellants in the Ohio trial Court and appellate Courts were Paul Scott, Shari Scott and Sidney W. Mintz.

Defendants in the Court of Common Pleas of Franklin County, Ohio, Probate Division, were Rhoda Mandel Greenberg, Executrix of the Estate of Jennie Mandel

Barnett, deceased, Enid Mandel Resnick and Linda Resnick Marans. By entry filed in the Court of Common Pleas on August 16, 1984, Executrix Rhoda Mandel Greenberg was removed and a Special Administrator, Bryan Johnson, Esq. was appointed and substituted in her place. Appellees in the Court of Appeals and in the Supreme Court of Ohio were the defendants and the Special Administrator specified above.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

PAUL SCOTT,

Petitioner

v.

RHODA MANDEL GREENBERG, EXECUTRIX OF THE ESTATE OF JENNIE MANDEL BARNETT, deceased [Bryan B. Johnson, Administrator dbn WWA substituted], ENID MANDEL RESNICK, LINDA RESNICK MARANS

Respondents

TO THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

Paul Scott petitions this Court to issue a writ of certiorari to the Court of Appeals of Ohio, Tenth Appellate District (hereinafter Court of Appeals),

to review a decision of that Court, rendered on March 20, 1986, which affirmed a decision of the Court of Common Pleas, Probate Division, rendered September 10, 1985, denying petitioner's requested continuance and directing the jury to return a verdict upholding the decedent's purported last will and testament.

OPINIONS BELOW

On September 10, 1985, the underlying Will Contest action herein was called for trial before the Court of Common Pleas of Ohio, Probate Division (Richard B. Metcalf, Presiding). Petitioner's counsel orally moved the Court for a continuance on September 9, 1985 and the Court overruled the motion without reciting its reasoning therefor.

An entry overuling the motion for a continuance was filed on October 22, 1985 as was a Judgment on Jury Verdict. No opinion was rendered by the Court of Common Pleas.

The Court of Appeals, by opinion rendered March 20, 1986, affirmed the judgment of the Court of Common Pleas (Appendix, infra, A1-A8).

The Supreme Court of Ohio, by entry of July 9, 1986, denied Plaintiff's motion to direct the Court of Appeals to certify its record and summarily denied plaintiff's claimed appeal as of right from said Court's decision. (Appendix, infra, A9-A10)

JURISDICTIONAL STATEMENT

This petition seeks review of a decision of the Court of Appeals, rendered on March 20, 1986. A motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record and plaintiff's claimed appeal as of right to that Court was denied in an entry filed on July 9, 1986. The present petition was filed with this Court within ninety days of that date.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the

United States Constitution states, in pertinent part, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law..."

2. Article 1, § 16 of the Ohio State Constitution provides:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

3. § 2107.71 of the Ohio Revised Code provides, in pertinent part:

" (A) A person interested in a will or codicil admitted to probate in the probate Court *** may contest its validity in a civil action in the probate Court in the county in which such will or codicil was admitted to probate.***"

STATEMENT OF THE CASE

On September 9, 1985, the day before the scheduled trial in the underlying will contest action in the Court of Common Pleas of Franklin County, Ohio, Probate Division, and again on September 10, 1985, the scheduled date of trial, plaintiff's counsel orally moved the Court for a continuance on the grounds that petitioner, Paul Scott, a party and material witness, was unable to appear due to medical incapacity. Additionally, plaintiff's counsel advised the Court that documentation supporting petitioner's medical incapacity and his resulting inability to travel to the Ohio Courthouse from the State of New York, was in transit but had not as yet been received by him. (Appendix, infra, A4) The letter of Simon Sanchez, M.D. (A11-A12) was

admitted as an additional record on September 11, 1985 (A5). The doctor's letter to the Court (A11-A12) attested that the writer, after examining his patient on September 7, 1985, advised the petitioner not to travel from New York state to the Ohio Courthouse for the trial scheduled only three days later on September 10, 1985, but recommended a sixty day recuperation period to avoid irreparable harm.

The Probate Court denied the continuance and immediately instructed the jury to return a verdict upholding the validity of the challenged paper writing purportedly left by the petitioner's mother as her last will and testament. The trial Court's advised the jury, in its opening remarks, that:

> "the plaintiff didn't show up *** so we aren't going to have to listen to that part of it and it will be over

very quickly." (A6-A7)"

In a decision rendered on March 20, 1986, the Court of Appeals affirmed the judgment of the Probate Court, holding, inter alia, that on the basis of the record, they were unable to say that there had been a demonstration that the trial Court abused its discretion in denying the continuance based upon the asserted inability of one plaintiff to appear at the trial. Additionally, the Court found that there was nothing in the record to demonstrate that Mr. Scott became aware of his condition only a few days before trial. (A6) Furthermore, the Court held that while plaintiffs were still entitled to put on their case and to cross-examine witnesses, there was no indication that they were prepared to do so. (A6) The Court overruled plaintiffs'

assignments of error.

In an entry of July 9, 1986 the Supreme Court of Ohio denied plaintiffs' motion to direct the Court of Appeals to certify its record and summarily dismissed plaintiffs' claimed appeal, as of right. (A.9-A10)

STATEMENT OF FACTS

The underlying action herein was commenced in the Court of Common Pleas of Franklin County, Ohio, Probate Division, in the early months of 1983 by Paul Scott, the son of Jennie Mandel Barnett, late of Franklin County, Ohio, who died untimely on September 24, 1982 and by other beneficiaries and or executors under a will dated August 11, 1977, and left by said decedent. Jennie Mandel Barnett left a paper writing dated March

17, 1980 as her purported last will and testament, which was admitted to probate by the Probate division of the Common Pleas Court of Franklin County, Ohio on the fifth day of November, 1982.

The plaintiffs contended, inter alia, that the decedent lacked the testamentary capacity to make a will at the time the purported will was executed on March 17, 1980, that undue influence was exerted upon the decedent at the time of making the purported will, which gave the defendants Rhoda Mandel Greenberg and Enid Resnick a substantially favored position and that one or more of the defendants herein thereafter caused the death of the decedent and may not take under the purported will.

An entry initially set the will

contest for trial on May 17, 1984 at 9:30 a.m. in the Probate Court of Franklin County, Ohio (Metcalf, J.) The trial was continued until July 9, 1984, in part, because neither side had completed pre-trial discovery. Defendant Rhoda Mandel Greenberg was called by the plaintiffs' for cross-examination and was examined under oath before a licensed professional reporter and notary public on June 7, 1984. Shortly thereafter, and based upon the testimony elicited, plaintiffs' moved the Court for an indefinite continuance on the grounds that defendant Rhoda Mandel Greenberg and defendant Enid Resnick caused the untimely death of Jennie Mandel Barnett and were not entitled under Ohio law to take under the purported will admitted to probate, under any prior wills, or under the statute of descent or distribution.

Additionally, a motion was pending in the Court of Common Pleas for removal of Rhoda Greenberg as Executrix for failure or refusal to commence a wrongful death action and to authorize the release of hospital records relating to the decedent's untimely death. At a conference and hearing regarding the aforementioned motions held on July 17, 1984, the trial Court ordered the removal of Rhoda Herschler Greenberg as Executrix and ordered that she be substituted by Bryan B. Johnson, Administrator de Bonis Non with Will Annexed.

The record below demonstrates that the underlying action was hotly contested, with a substantial showing of diligence on the part of the highly motivated plaintiff, Paul Scott, who alleged and fully intended to prove in Court that his sisters (Rhoda Mandel

Greenberg and/or Enid Resnick) had intentionally caused the untimely death of his mother, Jennie Mandel Barnett. Additionally, the petitioner alleged and fully intended to prove that the defendants would unjustly profit from their illegal acts, if the paper writing purported to be the Last Will and Testament of petitioner's mother were upheld. The record further demonstrates that petitioner herein is impaired as a result of an almost totally disabling syndrome of disequilibrium, which is exacerbated by stress and extremes of climate. (A11-A12) Additionally, the record shows that petitioner's medical condition deteriorated substantially during an unprecedented heat wave, the week preceeding the trial date and that the doctor requested a sixty day continuance to allow his patient to

recover his health. The doctor opined that petitioner's travel to the distant Court and participation in potentially stressful family related litigation could cause irreparable damage to his health and was strictly against medical advice.

REASONS FOR GRANTING REVIEW

THIS COURT SHOULD GRANT CERTIORARI HEREIN AS THIS CASE INVOLVES A BASIC CONSTITUTIONAL ISSUE, LIKELY TO RECUR IN ALL JURISDICTIONS, AS TO WHETHER OR NOT A STATE COURT, FOR REASONS OF ADMINISTRATIVE CONVENIENCE, MAY DENY ACCESS TO THE COURT AND A DECISION BASED UPON THE MERITS OF THE CASE, WHERE A PARTY AND MATERIAL WITNESS IS MEDICALLY INCAPACITATED AND INCAPABLE OF TRAVELING TO THE COURT ON THE DATE OF TRIAL.

§ 2107.71 of the Ohio Revised Code provides, in pertinent part:

> "(A) A person interested in a will or codicil admitted to probate in the probate Court *** may contest its validity in a civil action in the probate Court in the county in which such will or codicil was admitted to probate.***"

The above quoted statute establishes a cause of action and confers a right of access to the probate Court in order to litigate such action and to obtain a decision on the merits. In addition, the right of redress in the Courts of Ohio is Constitutionally guaranteed under Article 1, § 16 of the Ohio State Constitution.

This Court has held that a cause of action, such as that implicated in the instant case, is a species of property protected under the Fourteenth Amendment, which property interest may only be extinguished if the state observes Constitutionally adequate procedures. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 429, 430, Societe Internationale v. Rogers, 357 U.S. 197 (1958); Mullane v. Central Hanover Bank & Trust

Co., 339 U.S. 306 (1950). The adequacy of procedures followed is a question of federal Constitutional law. Logan, 455 U.S. at 432, Vitek v. Jones, 445 U.S. at 490 - 491, n. 6, quoting Arnett v. Kennedy, 416 U.S. at 167.

This case presents the basic Constitutional question of whether or not a party has a right to expect a decision from a state trial Court based upon the merits of his or her claim. May a state Court judge terminate a claim or cause of action without regard to its validity or to the diligence of the parties, but only to serve the goals of judicial economy and or bureaucratic expedience ? In the instant case, plaintiffs' right to be heard on the merits was denied despite a showing of a necessary party and primary witness' compelling medical reasons for

his non-appearance in Court and the submission to the Court of supportive detailed medical documentation. Petitioner respectfully requests that this Court find that such a denial is violative of fundamental Due Process protections, under the Fourteenth Amendment to the United States Constitution.

The Termination of Petitioner's Claims, Without a Decision on Its Merits, Violates Due Process.

Petitioner submits that the termination of his claims, under the circumstances of this case, constitutes a deprivation of Due Process, under the Fourteenth Amendment to the United States Constitution.

Due Process requires "an opportunity ... granted at a meaningful time and in a meaningful manner, " Armstrong v. Manzo, 380 U.S. 545, 552, 552 (1965), Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, (1950).

A merit based decision is a minimum requirement of Due Process. In Bell v. Burson, 402 U.S. 535 (1971), this Court struck down a Georgia statute which provided for the suspension of the driver's license of an uninsured motorist who is involved in an accident unless security was posted equal to the amount of damages claimed. The statute provided for a hearing, but required that the question of the driver's fault be excluded from consideration at the hearing. Although this Court held that a full adjudication was not required, it

held that procedural Due Process minimally required a preliminary inquiry to determine whether there was a reasonable possibility that a judgment would be rendered against the licensee. Id. at 540.

In Barry v. Barchi, 443 U.S. 55 (1979), this Court required a merit based decision before the suspension of a racehorse trainer whose horses had been drugged, became final. In both Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), a decision on the merits was required before a private party could avail himself of state procedures for altering the property rights of other private parties, even though the alteration would involve only a temporary deprivation. See also, Goldberg v. Kelly,

397 U.S. 254 (1970) (welfare benefits not to be terminated without a decision on the merits); Goss v. Lopez, 419 U.S. 595 (1975) (in school suspension cases, students have rights to informal hearings and review).

In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the appellant's timely filed charge of employment discrimination with the Illinois Fair Employment Practices Commission was extinguished without a decision on the merits because of the negligent or inadvertant failure of the commission to convene a timely fact finding conference. This Court held that the state could not, consistent with Due Process and Equal Protection Rights, extinguish the appellant's claim. The Court rejected the argument that since the state conferred the statutory claim or cause of action they could establish

such procedures as they saw fit. The Court held that while the legislature may elect not to confer a property interest, it may not Constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards consistent with federal guarantees. The Court found that the right to use the Fair Employment Practices Act's adjudicatory procedures was a species of property which is protected under the Fourteenth Amendment to the United States Constitution.

In the instant case, petitioner's right to redress and to contest the validity of the subject will, in the probate Court of Franklin County, Ohio is conferred by § 2107.71 of the Ohio Revised Code and by Article 1, § 16 of the Ohio State Constitution. Having once conferred this protected property right,

the state may not Constitutionally authorize the deprivation of such an interest, without appropriate procedural safeguards consistent with federal guarantees. It is respectfully submitted that the denial of a merit based determination herein presents a deprivation of Constitutional proportion, which decision should be considered for review by this Honorable Court.

CONCLUSION

Petitioner respectfully urges that this Court grant the petition and issue a writ of certiorari to the Court of Appeals of Franklin County, Ohio, Tenth Appellate District, to review the decision that Court rendered against him, upholding the Probate Court's denial of a continuance, denying petitioner a decision on the merits of his claim and directing the jury to return a verdict upholding the validity of the challenged purported Last Will and Testament of Jennie Mandel Barnett, deceased.

Respectfully Submitted,

RONALD PODOLSKY, ESQ.
Attorney for petitioner
15 Park Row
New York, N.Y. 10038
(212) 460-8218

APPENDIX

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DECISION OF THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Paul Scott, et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	Case No. 85AP-1013
Rhoda Mandel Greenberg, Executor of the Estate of Jennie Mandel Barnett, deceased [Bryan B. Johnson, Administrator dbn WWA substituted] et al.,	:	(Regular calendar)
Defendants-Appellees.	:	

M E M O R A N D U M D E C I S I O N

Rendered on March 20, 1986

MESSRS. BAILEY, HOUFEK & HOOVER, and MR. DOUGLAS E. HOOVER, for appellants.

MESSRS. WASSERSTROM, KIRKWOOD & SOLTIS, and MR. STEVE M. SOLTIS, for appellees.

MR. BRYAN B. JOHNSON, Administrator de

Bonis Non With Will Annexed.

APPEAL from the Court of Common Pleas of Franklin County, Probate Division.

NORRIS, J.

By their assignment of error, plaintiffs first contend that the trial court erred in overruling their motion for a continuance of the trial. Trial courts enjoy considerable discretion in determining whether a continuance should be granted. Cherry v. B. & O. Rd. (1972), 29 Ohio St.2d 158; State, ex rel. Buck v. McCabe (1942), 140 Ohio St. 535, at 538. Accordingly, in order to prevail on this argument, plaintiffs must demonstrate that the trial court abused its discretion in declining to continue the trial date.

According to the record, the trial

court, on May 10, 1985, set the will contest action for trial on September 10, 1985. Then, on September 5, it set for September 9, a hearing to consider an application by the administrator to authorize him to waive confidential communication privileges. An entry, filed October 22, recites that, on September 9, the trial court heard an oral motion of counsel for plaintiffs for a continuance of the trial, for the reason that the plaintiff Paul Scott was unable to attend due to ill health, and overruled the motion without reciting the trial court's reasoning. Also filed on October 22, was a Judgment on Jury Verdict which recited that the action came on for trial before the court and a jury, "and the issues having been duly tried and the jury having been directed by the Court to render its verdict to sustain" the will,

judgment was entered against the plaintiffs. No date of trial is recited in this entry of judgment.

A transcript of proceedings on September 10 has been filed, and it records the efforts of plaintiffs' counsel to obtain a continuance, on the basis that:

"***I was informed by my client, Paul Scott, yesterday that, due to medical and health reasons, he would be unable to be present today in court and would not be able to travel from the State of New York.

"He informed me that he has a letter detailing all these matters coming from his doctor. That hasn't come to my office as of this moment.***"

Opposing counsel contested the motion for the reason that:

"***Plaintiffs in this case have refused in the past on numerous occasions to appear for depositions and for other discovery proceedings when requested to do so. In fact, it was necessary for the

Court to in fact order them into town so a deposition could be taken.

"In fact, the case has been pending for a period in excess of two years now.

"Since we have reached this stage today where everybody is prepared for trial, the Defense is ready. The Defense had its witnesses ready. So accordingly we feel the motion for continuance is without merit and should be overruled at this point."

The trial court responded:

"The Court finds that there was ample notice of trial; that the Defense is prepared and ready to go forward and the Plaintiff is not.

"Continuance is denied."

The court also declined to delay its ruling until the letter from Mr. Scott's physician arrived. A letter from Simon Sanchez, M.D., dated September 7, appears in the court file with a filing notation of September 11, and attests that its writer had advised Mr. Scott not to travel to Ohio for the trial. There is nothing in the record to demonstrate that

Mr. Scott became aware of his condition only a few days before trial.

On the basis of this record, we are unable to say that there has been a demonstration that the trial court abused its discretion in denying the continuance based upon the asserted inability of one plaintiff to appear at the trial.

Plaintiffs were, of course, still entitled to put on their case and to cross-examine defense witnesses. However, there is nothing in the record to indicate that plaintiffs were prepared to present evidence and were prevented from doing so by the trial court. Although, in his opening remarks to the jury, the trial judge advised them that "the plaintiff didn't show up***[s]o we aren't going to have to listen to that part of

it and it will be over very quickly." he later noted that defendants were ready to proceed "and the Plaintiff is not." We find no proffer of evidence by plaintiffs' counsel, nor did counsel specifically object to the trial court proceeding without affording him an opportunity to put on plaintiffs' evidence. The trial court obtained stipulations from the parties concerning the admission of the will and, in the absence of evidence from plaintiffs, directed a verdict.

We are, therefore, left with much the same situation as with plaintiffs' first contention--in the absence of the demonstration of irregularity, we must presume that the trial court proceeded properly, after having ascertained that plaintiffs were not prepared to proceed

to trial by presenting evidence to support their case.

The assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

MOYER, P.J., and LYNCH, J., concur.

LYNCH, J., retired, of the Seventh Appellate District, assigned to active duty pursuant to Section 6(C), Article IV, Ohio Constitution.

THE SUPREME COURT OF OHIO

COLUMBUS

1986 Term

To wit: July 9, 1986

Paul Scott, et al., :

Appellants :

v. : Case No. 86-661

E N T R Y

Rhoda Mandel :

Greenberg, et al.,

Appellees :

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record

and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

Costs:

Motion fee, $20.00, paid by Douglas E. Hoover.

s/FRANK D. CELEBREZZE

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

PETITIONER'S APPENDIX

LETTER OF SIMON SANCHEZ, M.D., DATED SEPTEMBER 7, 1985

SIMON SANCHEZ, M.D., P.C.

Eleven-Eleven Medical Center
1111 Montauk Highway
West Islip, New York 11795
(516) 422-6002

September 7, 1985

Judge Richard B. Metcalf
Court of Common Pleas
Probate Division
Franklin County, Ohio

Re: Case No. 347913-WC
Paul Scott, et al. v.
Rhoda Mandel Green-
-berg, et al.

Dear Judge Metcalf:

I am writing this letter on behalf of my patient Paul Scott, a 54 year old disabled Korean era veteran who has been in my care both in the Northport Veterans Administration Hospital and in my private practice since 1980.

Mr. Scott is being treated for a nearly totally disabling neurological syndrome of disequilibrium. He has a history of seizures and fainting spells. There is indication that Mr. Scott's symptoms are exacerbated by stress.

Mr. Scott does not function reliably

as his symptoms are recurring without warning. In order to control the symptoms he is dependent upon a carefully monitored intensive medication program. The medication is less effective on hot summer days and cold winter days at which times Mr. Scott is frequently confined to his home in order to avoid falling accidents. The Long Island area in which he resides has experienced an unprecedented heat wave during the past week and Mr. Scott's condition had deteriorated substantially.

I examined him today and advised him not to travel to Ohio during the week of September 10th and not to participate in a trial or any other stressful activities.

Mr. Scott's medical history and my assessment of his present medical condition suggests that it would be hazardous to his health to attempt distant travel and the prolonged stress associated with family related litigation at this time. I am concerned about the possibility of a seizure which could cause irreparable damage. It is submitted that Mr. Scott be allowed a 60 day adjournment in order to give him an opportunity to recuperate and for me to reevaluate his condition. His participation in a trial at this time would be strictly against my medical advice.

Your consideration to the above would be appreciated by the undersigned.

Sincerely,

s/Simon Sanchez

FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

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RHODA MANDEL GREENBERG, EXECUTRIX of the Estate of JENNIE MANDEL BARNETT, deceased (Bryan B. Johnson, Administrator dbn WWA substituted), and ENID MANDEL RESNICK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN E. HYKES
COUNSEL OF RECORD
3215 North High Street
Columbus, Ohio 43202
(614) 261-9742

STEVE M. SOLTIS
51 North High Street
Columbus, Ohio 43215
(614) 221-7546

RICHARD B. IGO
3215 North High Street
Columbus, Ohio 43202
(614) 261-9742

Attorneys for Respondents

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

QUESTION PRESENTED

Whether a state trial court may constitutionally deny a party's requested continuance when, in view of the totality of circumstances known to the trial judge, it is apparent that such party's actions theretofore have been dilatory, evasive and uncooperative; when such party fails to demonstrate the nature and substance of the evidence he would produce were the continuance granted; and when such party fails to indicate the prejudice that would result to him were the continuance denied.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Rhoda Mandel Greenberg, Executrix of the Estate of Jennie Mandel Barnett, deceased (Bryan B. Johnson, Administrator dbn WWA substituted) and Enid Mandel Resnick respectfully request this Court to deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeals of Ohio, Tenth Appellate District (hereinafter "Court of Appeals") which is reproduced beginning at page A-1 of Petitioner's Petition for Writ of Certiorari.

STATEMENT OF FACTS AND OF THE CASE

Unfortunately, Petitioner's Statement of Facts is somewhat incomplete and inaccurate.

This action was commenced on February 9, 1983, as a will contest in the Franklin County, Ohio Court of Common Pleas, Probate Division. In his Complaint, Petitioner (plaintiff below) alleged that the decedent's Last Will and Testament dated March 17, 1980, and admitted to probate by the Court on November 5, 1982, should be declared invalid and set aside.

Petitioner's complaint was based upon two theories. First, that the decedent lacked the testamentary capacity to make a Will at the time her Will was executed on March 17, 1980, and, second, that undue influence was exerted upon the decedent at the time of the making of said Will. No allegation was contained in the complaint to the effect that "defendent Rhoda Mandel Greenberg and defendent Enid Resnick caused the untimely death of the decedent, Jennie Mandel Barnett, and were not entitled under Ohio law to take under the purported Will admitted to probate, under any prior wills, or under the statute of descent and distribution." (Petition p. 11).

After much delay, the case was set for trial by jury on September 10, 1985. At a conference with the trial judge in chambers on the morning of September 9, 1985, the day prior to the trial, counsel for the Petitioner orally moved the Court for a continuance of the jury trial for the reason that Petitioner Paul Scott was unable to attend the trial due to medical reasons. This motion was opposed by counsel for Respondents for reasons of timeliness and repeated dilatory tactics of the Petitioner. The Court overruled said motion.

When the case was called for trial on September 10, 1985, Petitioner was not present in the courtroom. Counsel for Petitioner again moved the Court, on the record, for a continuance of the trial. Respondents'

counsel again opposed the motion because of Petitioner's past history of delay. The Court likewise overruled that motion.

A review of the record reveals a history of delay and non-cooperation on Petitioner's part which is stated in greater detail in Respondents' argument set forth hereinafter. Petitioner contends that the trial court erred to his prejudice in refusing to grant a continuance of the trial. Respondents maintain that such is not the case; rather the court did not abuse its discretion or violate Petitioner's constitutional rights in refusing the continuances after taking into account Petitioner's prior actions.

REASONS WHY THE WRIT SHOULD BE DENIED

Prior decisions of this Court and lower courts are controlling and support the opinion below. Examination of all pertinent circumstances known to the trial judge makes it clear that the denial of Petitioner's motion for continuance violated none of Petitioner's constitutional rights.

The record in this case reflects numerous documented actions whereby Petitioner sought delay herein through dilatory, evasive and uncooperative conduct.

First, the record reflects that discovery interrogatories submitted to Petitioner on June 22, 1983 were not answered until Respondents were forced to file a motion to compel answer to interrogatories on November 17, 1983.

Later, On December 19, 1983, Respondents filed a notice to take the depositions of Petitioner and other persons. Due to Petitioner's lack of cooperation, Respondents were required to file a motion on April 4, 1984 for an order to apply sanctions pursuant to Ohio civil procedure because of Petitioner's failure to appear for deposition. This further necessitated a judgment entry being filed on May 14, 1984 ordering Petitioner and other persons to appear on June 7, 1984 for depositions or suffer dismissal of the action with prejudice.

In addition, the record contains an entry filed March 7, 1984 scheduling the case for trial on May 17, 1984. Because Petitioner failed to appear in Franklin County, Ohio for depositions until the trial court ordered him to appear under threat of dismissal of the case with prejudice, the May 17, 1984 trial date had to be vacated. On July 3, 1984, Petitioner applied for and was granted an indefinite continuance pending his pursuit of an action against the hospital where the decedent died and against Respondents Greenberg and Resnick and others. On May 10, 1985, the matter was set for pre-trial before the Court at which time the trial judge, in his discretion,

proceeded to set the matter for trial on September 10, 1985.

Additionally, at no time did Petitioner's counsel proffer to the trial court the nature or substance of the evidence Petitioner would have given had he been present; nor did he indicate how Petitioner would have been prejudiced by his absence from the trial.

It is elementary that the matter of a continuance rests in the sound discretion of the trial court. Ordinarily, that action is not reviewable. Thus, it would take an "extreme case" to make the denial of a continuance a violation of due process. *Franklin v. South Carolina*, 218 U.S. 161, 168 (1910).

In view of that principle, this Court has held that there are no mechanical tests for deciding whether the denial of a continuance is so arbitrary as to violate due process. That determination can only be made based on the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Ungar v. Sarafite*, 376 U.S. 575, 589-90 (1964).

The trial court in *Ungar* had denied a continuance to a witness who contended, among other things, that he was "not in any physical or mental condition to testify." 376 U.S. at 580. The witness requested an opportunity to present medical and expert testimony that would show him not guilty of the contempt with which he was charged (which apparently he never produced). This Court, in holding no violation of due process, found it significant that the witness never revealed the name of the expert witness he expected to call or the substance of the testimony he supposedly would have given. 376 U.S. at 590-91. Whether or not another judge would have granted a continuance under the circumstances does not raise a constitutional issue. 376 U.S. at 591. See, also, *Hardy v. United States*, 186 U.S. 224, 227 (1902) (it is not improper for a trial court to consider

the movant's motives, such as his desire to delay or postpone the trial for tactical reasons, in ruling on a motion for continuance).

Lower courts have found no violation of due process or abuse of discretion if a party does not indicate to the trial court the nature and substance of the evidence he would produce if his request for continuance were granted. *United States v. Jones*, 369 F. 2d 217, 220 (7th Cir. 1966), *cert. denied sub nom., Watkins v. United States*, 386 U.S. 944 (1967); *Cash v. Murphy*, 339 F. 2d 757, 758 (5th Cir. 1964) (continuance requested for medical reasons denied). Some courts have held that the movant must demonstrate the prejudice that would result to him were the continuance not granted. *United States v. Jones*, 730 F. 2d 593, 596-97 (10th Cir. 1984); *Smith v. Daniel*, 46 F. 2d 740, 742 (6th Cir.) *cert. denied*, 283 U.S. 852 (1931) (continuance requested for medical reasons denied). Specifically, a movant's rights are held to be not violated when his requested continuance for medical reasons is denied, if the record reflects the movant's history of dilatory tactics. *Speers Sand & Clay Works v. American Trust Co.*, 52 F. 2d 831, 832 (4th Cir. 1931) *cert. denied*, 286 U.S. 548 (1932); *Druckman v. Forsyth Furniture Lines, Inc.*, 22 F. 2d 59,60, *rehearing denied*, 23 F. 2d 493 (4th Cir. 1927).

The Court of Appeals below, in holding against Petitioner, found it significant that Petitioner's counsel at no time indicated or proffered to the trial court the nature and substance of the evidence Petitioner would have given had the requested continuance been granted; and, further, that counsel did not demonstrate how Petitioner was prejudiced by the denied continuance. (Petition A-6, A-7).

CONCLUSION

At the time of trial, the case had been pending approximately thirty-one months. In keeping with the court's objective of dispensing justice without needless delay and after considering Petitioner's numerous instances of dilatoriness and non-cooperation, Respondents submit that the trial court did not abuse its discretion or violate Petitioner's constitutional rights in overruling the latter's requests for continuances. Respondents, therefore, respectfully urge the Court to deny the requested writ of certiorari.

Respectfully submitted.

JOHN E. HYKES
COUNSEL OF RECORD
Attorney for Respondents
3215 North High Street
Columbus, Ohio 43202
(614) 261-9742

STEVE M. SOLTIS
Attorney for Respondents
51 North High Street
Columbus, Ohio 43215
(614) 221-7546

RICHARD B. IGO
Attorney for Respondents
3215 North High Street
Columbus, Ohio 43202
(614) 261-9742

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing, Respondents' Brief in Opposition have been served upon petitioner, Paul Scott, by mailing such copies to the office of petitioner's counsel of record, Ronald Podolsky, 15 Park Row, New York, New York 10038, by U.S. Mail First Class postage prepaid, this 31st day of October, 1986.

I further certify that all parties required to be served have been served.

JOHN E. HYKES
Attorney for Respondents